No. 97-876

(2)

U.S.
FILED
JAN 14 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

DONALD R. BIRGEL,

Petitioner,

vs.

BOARD OF COMMISSIONERS OF BUTLER COUNTY, OHIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JACK C. McGOWAN
Counsel of Record
SCHEPER & McGOWAN
Attorneys for Respondent
246 High Street
Hamilton, Ohio 45011
(513) 844-2000

144107

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

12 pp

TABLE OF CONTENTS

	Page
Statement of Jurisdiction	1
Statement of the Case	2
Reasons for Denying the Writ	4
In Deciding This Case The Sixth Circuit Applied The Law Of The Case Doctrine Correctly In Accordance With Ohio Law And In Accordance With The Issue Preclusion Branch Of The Doctrine Of *Res Judicata.*	4
A. Law Of The Case	4
B. *Res Judicata*	5
C. There Is No Conflict In The Courts Of Appeals.	6
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Board of Health of St. Bernard v. City of St. Bernard, 19 Ohio St. 2d 49 (1969)	6
Clay Hyder Trucking Lines, Inc. v. Riley, 16 Ohio App. 3d 224 (1984)	6

Contents

	Page
Employee's Owned Federal Credit Union v. City of Defiance, 752 F.2d 243 (6th Cir. 1985)	4
Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938)	5, 8
Gilbert v. Braniff International Corp., 579 F.2d 411 (7th Cir. 1978)	7
Great Lakes Dredge and Dock Co. v. Tanker, 957 F.2d 1575 (11th Cir. 1992)	4
Harbor Insurance Co. v. Essman, 918 F.2d 734 (8th Cir. 1990)	4
Karam v. Allstate Ins. Co., 27 Ohio App. 3d 137 (1985)	6
King v. Order of Travelers, 333 U.S. 153 (1948)	5
Krahn v. Kinney, 43 Ohio St. 3d 103 (1989)	6
Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S. Ct. 892 (1984)	5, 6
Rekhi v. Wildwood Industries, Inc., 61 F.3d 1313 (7th Cir. 1995)	4, 5
Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991)	4

Contents

	Page
Standard Oil Command v. Grice, 68 Ohio App. 2d 97 (1975)	6
Stoner v. New York Life Insurance Co., 311 U.S. 464 (1940)	4
Torres v. Sears Roebuck & Co., 68 Ohio App. 2d 87 (1980)	6
West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940)	4
Whitehead v. General Telephone Co., 20 Ohio St. 2d 108 (1969), *overruled in part on other grounds, Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995)	6
Winchester Homes. Inc. v. Osmose Wood Preserving, Inc., 37 F.3d 1053 (4th Cir. 1994)	6, 7
Statute Cited:	
O.R.C. 307.86	2
Rule Cited:	
Ohio Rules of Civil Procedure 41(A)(l)0(a)	1
Other Authority Cited:	
46 American Jurisprudence 2d, 776, Judgments, Section 515 (1994)	5

STATEMENT OF JURISDICTION

Petitioner, Donald R. Birgel (hereinafter referred to as "Petitioner") brought an action in the Court of Common Pleas of Butler County, Ohio an August 18, 1992 alleging a breach of contract arising out of dealings which he had in connection with the offering of disability insurance to employees of Butler County (hereafter "Respondent"). On February 3, 1994 the state trial court dismissed the action on the basis that there was no contract between the parties. Petitioner then took an appeal to the Ohio Court of Appeals for the Twelfth District which determined that Petitioner had failed to establish an enforceable contract. However, before suffering a summary judgment, the court found the Petitioner should have been permitted to attempt to amend his complaint to frame a cause of action for damages incurred as a result of the faulty bidding procedure. Although the failure to show the existence of a contract substantially depreciated his claim for relief, he was nevertheless entitled to notice of the action the trial court intended to take. Accordingly, the court of appeals remanded the action to the common pleas court "in order to afford appellant (here Petitioner) an opportunity to be heard as to any *remaining* issue in the case". (emphasis added). Petitioner then filed a Notice of Dismissal under Ohio Rules of Civil Procedure 41(A)(l)0(a).

Thereafter Petitioner brought this action in United States District Court for the Southern District of Ohio, Western Division repeating verbatim all of the allegations of the complaint originally filed in state court and adding an additional paragraph alleging the diversity of citizenship which had occurred in the meantime when the Petitioner moved to Michigan. Petitioner, however, was unable to adduce any evidence beyond that which he had mounted in support of his claim in state court and on July 17, 1996, the District Court entered judgment for respondent on the basis of the doctrine of law of the case.

On September 16, 1997 the United Stated Court of Appeals for the Sixth Circuit affirmed the District Court and upheld the dismissal of the action both on the doctrine of law of the case and also *res judicata.*

STATEMENT OF THE CASE

On December 21, 1990, Richard Law, Purchasing Director for Respondent sent a letter to Pat Connelly, Assistant Prosecutor for Respondent, seeking an opinion whether an employee-paid disability-income insurance coverage plan would have to be set for bids. In his opinion letter, Mr. Connelly stated that the Respondent's solicitation of disability insurance did not meet any exemption to the competitive bidding statute O.R.C. 307.86. Mr. Connelly concluded that county participation meant that the Respondent would have to comply with the statute. In Mr. Connelly's opinion county participation existed through its undertaking to administer the premium deduction as well as making its employees available on county time for solicitation. The specifications that were subsequently developed *called for qualifying periods and other terms which were not generally available in the insurance industry*, a fact which Mr. Connelly only learned later from Petitioner himself. The Notice to Bidders contained the following statements:

> Bid quotations submitted shall impose no liability or obligation on the County of Butler. The Board of Butler County Commissioners reserves the right to waive informalities, to reject any and all proposals and to accept the proposal which may be deemed in the best interest of the County of Butler.

The Bid Request contained the following provision:

> Prior, 120-day notice required for Butler County or insurance company to cancel contract for any reason.

By Resolution #91-3-467 of March 28, 1991, Respondent accepted "the proposal submitted by Monarch Life Insurance Company to provide a disability income insurance plan for County employees." Nevertheless, no written contract was ever executed. As it turned out, Monarch Insurance Company did not even write policies for law enforcement personnel, and thus was unable to cover all county employees.

Thereafter, the prosecutor's office received oral protests from several different bidders and from a couple of companies. The points of complaint were the vagueness of the specifications and the award to a company whose bid did not match the specifications. Mr. Connelly's investigation confirmed that Petitioner's bid contemplated a separate policy of insurance from a different company other than Monarch for the law enforcement officers; however, a bid had not been submitted for that company.

Respondent sought an opinion from the prosecutor concerning its approval of Monarch's bid. On May 31, 1991, Mr. Connelly responded, concluding that the specifications did not meet minimal underwriting requirements, and so were incomplete. The Monarch/Birgel bid failed to include written provisions for the sheriff's deputies. Therefore, the prosecutor recommended rescission of the prior approval and re-advertisement using more comprehensive specifications.

On September 24, 1991, the Respondent rescinded Resolution 91-3-467 and authorized preparation of new bid specifications and documents. These were to be reviewed by the prosecutor before advertising for bid. Petitioner took no action, and the Respondent re-advertised for bids, which were opened on December 19, 1991. Only after the Respondent approved a plan submitted by another bidder did Petitioner institute the state court action. Upon an adverse determination by the state court of appeals, Petitioner dismissed that action and instituted this action.

REASONS FOR DENYING THE WRIT

IN DECIDING THIS CASE THE SIXTH CIRCUIT APPLIED THE LAW OF THE CASE DOCTRINE CORRECTLY IN ACCORDANCE WITH OHIO LAW AND IN ACCORDANCE WITH THE ISSUE PRECLUSION BRANCH OF THE DOCTRINE OF *RES JUDICATA*.

A. Law Of The Case

The question of whether Petitioner stated a cause of action for breach of contract was decided by the state trial court and the state court of appeals. The Ohio Court of Appeals has spoken "sufficiently firm" and, therefore, conclusively. *Employee's Owned Federal Credit Union v. City of Defiance*, 752 F.2d 243 (6th Cir. 1985). The Court of Appeals for the Sixth Circuit correctly applied *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940). There was no evidence that the highest court of Ohio would decide differently, and, therefore, the district court was constrained to follow the state appellate court's decision. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940).

The cases cited by Petitioner are clearly distinguishable. In *Great Lakes Dredge and Dock Co. v. Tanker*, 957 F.2d 1575 (11th Cir. 1992) and *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207 (5th Cir. 1991), the courts found that the issue sought to be precluded had not been before them previously. In contrast, the issue of breach of contract was squarely addressed by both the trial court and the court of appeals. In *Harbor Insurance Co. v. Essman*, 918 F.2d 734 (8th Cir. 1990), the issue was whether a previous federal dismissal without prejudice was the law of the case. *Rekhi v. Wildwood Industries, Inc.*, 61 F.3d 1313 (7th Cir. 1995) turned on interpretation of an Illinois law. Nevertheless, the Seventh Circuit found that had the issue of

res judicata or issue of preclusion not been waived, it would have applied. The court remarked that if a ruling in the previous case was final in the sense of not tentative and not subject to further examination even though the case was being remanded, then the remand was irrelevant to the legal issue involved. *Rekhi*, at 1317. *King v. Order of Travelers*, 333 U.S. 153 (1948) is simply an application of the rule in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) that the federal courts are bound to follow the binding precedent of the highest court of the state in the same fashion in which an inferior court in the state would be bound. The Court's decision was very careful to limit that decision only to the effect of a court of common pleas decision in South Carolina. It was stated that the decision was not to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. Other situations and other states may well call for a different result.

In the instant case, the decision of the state court of appeals is the best evidence available of what the law of Ohio is on whether a contract existed between the parties, Application of the doctrine of law of the case serves to conserve judicial resources, reduces the possibility of inconsistent results by discouraging forum shopping and eliminates the expense of multiple lawsuits.

B. *Res Judicata*

The doctrine of *res judicata* rests upon public policy favoring the establishment of certainty in legal relations and individual rights. 46 American Jurisprudence 2d, 776, Judgments, Section 515 (1994). The doctrine is composed of two preclusionary concepts: claim preclusion, also referred to as "estoppel by judgment," and collateral estoppel, also referred to as "issue preclusion." *See Migra v. Warren City School District*

Board of Education, 465 U.S. 75, 77, 104 S. Ct. 892, 894, n.1 (1984); *Krahn v. Kinney*, 43 Ohio St. 3d 103 (1989). Claim preclusion bars the relitigation of the same cause of action between the same parties. *Karam v. Allstate Ins. Co.*, 27 Ohio App. 3d 137, 139-140 (1985). Collateral estoppel or issue preclusion, on the other hand, forecloses relitigation, in a different cause of action, of an issue that has been actually and necessarily litigated and determined. *Whitehead v. General Telephone Co.*, 20 Ohio St. 2d 108, 112 (1969), *overruled in part on other grounds*, *Grava v. Parkman Township*, 73 Ohio St. 3d 379, 382 (1995).

It is clear that the Sixth Circuit was discussing and applying the issue preclusion branch of *res judicata* in its decision here *Board of Health of St. Bernard v. City of St. Bernard*, 19 Ohio St. 2d 49 (1969); *Standard Oil Command v. Grice*, 68 Ohio App. 2d 97 (1975); *Torres v. Sears Roebuck & Co.*, 68 Ohio App. 2d 87 (1980) and *Clay Hyder Trucking Lines, Inc. v. Riley*, 16 Ohio App. 3d 224 (1984) all involved cases dismissed before adjudication of controlling legal issues by the trial court, much less the court of appeals. Thus, these cases only dealt with the right to refile as opposed to the legal effect of appellate rulings on substantive issues essential to the actions.

C. There Is No Conflict In The Courts Of Appeals.

Petitioner wrongly asserts that the decision below conflicts with *Winchester Homes. Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053 (4th Cir. 1994). In *Winchester*, the court was faced with the question as to what effect a non-suit prior to the entry of summary judgment by a trial court had on a subsequent action in federal court involving the same claim, The Fourth Circuit was faced with analyzing the result, under Virginia Law, of the non-suit at the trial level.

In contrast, Petitioner here did not file his notice of dismissal until after the state trial court entered its judgment dismissing

his claim for breach of contract and after the court of appeals affirmed the legal conclusion that Petitioner and Respondent did not have an enforceable contract. Thus, Petitioner has had a full and fair opportunity to fully litigate and to be heard in the due process sense. Had *Winchester* involved the entering of a non-suit after summary judgment and appellate court review, an entirely different result may have ensued.

In short, there is no authority found in *Winchester* which is of applicability to the present action.

Petitioner also misapplies *Gilbert v. Braniff International Corp.*, 579 F.2d 411 (7th Cir. 1978) in which the trial court sustained a motion to dismiss and to strike the complaint. At issue was the interpretation of an Illinois Supreme Court rule. In contrast, Petitioner suffered a decision adverse to him on the merits which was journalized. The decision that the parties did not have a contract was not affected by the appellate court's determination that he should have received notice before his case was dismissed. It is important to note that the state court of appeals did not remand with any instruction other than to resume the proceedings at the juncture where the motion of the appellant for a summary judgment was overruled. Consequently, the trial court merely had to give notice to the Petitioner that he was about to suffer a dismissal and the absence of amendment would have been compelled to dismiss on the basis of binding precedent between the parties.

Because Petitioner has not shown any legal conflict among the circuits on the question presented, his petition should be denied.

CONCLUSION

Petitioner incorrectly concluded that he could avoid the ramifications of the prior state court determinations by doing an "end around". In essence, as he implicitly admits in concluding his own brief, he wants the federal district court to perform an appellate review of both the state trial court and the state appellate court decisions. This is contrary to the doctrine of federalism and would afford him, on the basis of his willingness to move to another state, an opportunity not afforded other litigants. Had he chosen not to amend his complaint while in the state court system, there is no doubt that he would have suffered a dismissal with prejudice by the state trial court on remand. He then could have pursued his appeal, first to the court of appeals, and then to the Ohio Supreme Court. He voluntarily chose not to pursue that course. However, he is still bound by the doctrines of law of the case and *res judicata* which are substantive rules of law in the jurisdiction. When he came to the federal system, the dictates of *Erie Railroad v. Tompkins* imposed upon him the same rulings of state law. There is nothing unjust nor improper about this result. There is absolutely no reason for this court to grant certiorari for it would be virtually impossible to establish a rule which would be applicable for all cases given the need to analyze how each state treats the effect of a voluntary dismissal. Since a voluntary dismissal is not necessarily equivalent to a non-suit nor to other similar procedural devices in the several states, there would be no benefit in even attempting to fashion an all-inclusive rule.

Respectfully submitted,

JACK C. McGOWAN
Counsel of Record
SCHEPER & McGOWAN
Attorneys for Respondent
246 High Street
Hamilton, Ohio 45011
(513) 844-2000